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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) TKX-7468US									
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed name _____	Application Number 10/692,504	Filed 10/24/2003									
	First Named Inventor Zander										
	Art Unit 2178	Examiner Phenuel S. Salomon									
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <table><tbody><tr><td><input type="checkbox"/> applicant/inventor.</td><td>_____ /Michael J. Fogarty, III/ Signature</td></tr><tr><td><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</td><td>_____ Michael J. Fogarty, III Typed or printed name</td></tr><tr><td><input checked="" type="checkbox"/> attorney or agent of record. Registration number 42,541</td><td>_____ 972-732-1001 Telephone number</td></tr><tr><td><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34. _____</td><td>_____ February 20, 2009 Date</td></tr></tbody></table> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>				<input type="checkbox"/> applicant/inventor.	_____ /Michael J. Fogarty, III/ Signature	<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)	_____ Michael J. Fogarty, III Typed or printed name	<input checked="" type="checkbox"/> attorney or agent of record. Registration number 42,541	_____ 972-732-1001 Telephone number	<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34. _____	_____ February 20, 2009 Date
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<input checked="" type="checkbox"/> *Total of 1 forms are submitted.											

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Zander	Docket No.: TKX-7468US
Serial No.: 10/692,504	Art Unit: 2178
Filed: October 24, 2003	Examiner: Salomon, Phenuel S.
For: Setting up a Procedure of a Communication Taking Place Between Instances Using a Protocol Tester	

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Dear Sir:

Pending claims 1-11 have been rejected in the Final Office Action mailed September 4, 2008 (“the Final Action”).

Claims 1, 3-7 and 9-11 stand rejected under 35 U.S.C. § 103(a) as assertedly being unpatentable over a combination of WO 98/57268 to Swift, *et al.* (hereinafter “Swift”) in view of U.S. Patent No. 5,732,213 to Gessel, *et al.* (hereinafter “Gessel”). Claims 2 and 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Swift in view of Gessel and further in view of U.S. Patent No. 6,560,723 to Matsui (hereinafter “Matsui”). The claims, however, include limitations that are not taught or suggested by any of the cited references. Since these limitations are not shown in any of the references alone, they cannot be taught or suggested by the combination of references. Therefore, the claims are not obvious and should be allowed.

I. Abstract communication interfaces of the protocol layers not disclosed in the cited references

Claims 1 and 11 require the step of or means for “selecting abstract communication interfaces of the protocol layer which are involved in the communication.” The rejection of

claim 1 cites page 7, paragraph 2, lines 1-9 of the Swift reference as teaching this feature. (Final Action at 4).

The cited portion of Swift merely identifies a message sequence engine 218, which is a software application, and methods of implementing the message sequence engine 218, such as the PowerBuilder, C and C++ development environments. There is no discussion of a “protocol layer” in the cited paragraph. Furthermore, the cited paragraph fails to disclose “selecting abstract communication interfaces of the protocol layer.” There is no disclosure or suggestion that the message sequence engine 218 access or works with protocol layers or that engine 218 allows a user to select abstract communication interfaces of such protocol layers.

The paragraph following the cited paragraph (i.e. page 7, paragraph 3, lines 1-5 of Swift) further describes message sequence engine 218 as an application for creating a message sequence definition 222 and for transmitting the message sequence. Referring to Swift’s Figures 2 and 3, which are referenced on page 7, it is clear that message sequence engine 218 merely links together a number of different messages into a message sequence definition 222 that identifies how often to send the message, but does not allow the user to select “abstract communication interfaces of the protocol layer” which are involved in the communication or message sequence.

Applicant previously identified this deficiency in Swift in the Response to Non-final Office Action filed May 28, 2008 (“May 2008 Response”) at page 7-9. The Final Action fails to address Applicant’s objections to the Swift reference with respect to these features of the claims.

II. Graphically defining a message containing variable not disclosed in cited references

Claims 1 and 11 further require the step of or means for “defining within the communication data graphically a message from one instance to the other instance which contains a variable wherein the other instance performs one of several activities as a function of the content of the variable.” The rejection of claim 1 cites page 18, paragraph 2 of the Swift reference as teaching this feature. (Final Action at 4).

The cited disclosure is a description of Swift’s Figure 9, which illustrates a test environment - i.e. a test network and its components. The next paragraph (i.e. paragraph 3 on page 18 of Swift) further explains that - in the test environment of Figure 9 - command message

904 identifies a store forward file and start/stop timestamps. Data distributor 912 retrieves messages 906 falling within the start/stop timestamps from the designated store forward file and sends those messages to a target object.

There is no disclosure in Swift - either in the cited or subsequent paragraph - of “defining . . . graphically a message from one instance to the other instance.” The cited disclosure provides no description of how messages 904 or 906 are defined. Specifically missing is any disclosure of graphically defining messages 904 or 906.

Swift also fails to disclose “a message . . . which contains a variable” or that “the other instance performs one of several activities as a function of the content of the variable.” The cited disclosure fails to provide any information related to the content of messages 904 or 906. Specifically missing in the Final Action is any identification of what aspect of the Swift system corresponds to the claimed “variable” or how such variables cause the other instance to perform “one of several activities” based upon the variable.

Claims 1 and 11 specify that the message is “from one instance to the other instance,” wherein “one instance being a protocol tester and the other instance being a device under test.” Figure 9 and the disclosure at page 18 fails to identify any messages that are sent from a protocol tester to a device under test. If target 914 is the claimed “device under test,” then the only messages to reach the device under test (i.e. messages 906) do not come from a protocol tester as required by the claims.

Applicant previously identified this deficiency in Swift in the May 2008 Response at page 10. The Final Action fails to address Applicant’s objections to the Swift reference with respect to these features of the pending claims.

III. Conclusion

The Final Action also set forth a double patenting rejection. As indicated in the May 2008 Response, Applicant will submit a terminal disclaimer to overcome the double patenting rejection upon allowance of the claims.

In view of the above, Applicants respectfully request allowance of the present application.

Respectfully submitted,

February 20, 2009

Date

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